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No. 76-1819

In the Supreme Court of the United States

OCTOBER TERM, 1977

FIRST NATIONAL BANK IN ALBUQUERQUE,
AS GUARDIAN FOR AND ON BEHALF OF
DOROTHY JEAN HUCKLEBY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners challenge the holdings below that this suit is barred by the "discretionary function" exception to the Federal Tort Claims Act.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. 135-135k, prohibits the interstate shipment or sale of any economic poison which is misbranded. As specified in both the statute and regulations, an economic poison is misbranded if its label is false or misleading to the public in any particular. 7 U.S.C. 135(z)(1); 40 C.F.R. 162.14 (1974). As pertinent here, a poison is misbranded if (a) its label does not contain directions for use "which are necessary and if complied with

adequate for the protection of the public," or (b) the label does not contain a warning or caution statement that "may be necessary and if complied with adequate to prevent injury to living man and other vertebrate animals." 7 U.S.C. 135(z)(2)(c) and (d).

Panogen 15, a mercury alkyl, was first registered under FIFRA in 1953. The label, approved by the government, contained a skull and crossbones, the words POISON and DANGER, and a warning that the product was toxic to fish and wildlife. The label also warned that the product should be kept out of reach of children and should not be used, *inter alia*, for food or feed purposes. The label set forth antidote instructions in the event the substance was inhaled, swallowed, or absorbed (Pet. App. 7-8, 24).

Petitioner First National Bank in Albuquerque is the guardian for four minor children who suffered permanent disability from Panogen 15. The children ingested the poisonous material after eating meat from a pig which had been fed grain containing seed treated with the compound.[1] Petitioners brought suit under the Federal Tort Claims Act against the United States, alleging, *inter alia*, that the government had been negligent in failing either to require warning of food-chain poisoning on the label or to cancel registration of the product.[2] The district court and the court

[1]The children's father, Ernest Huckleby, had been given the grain by a retailer whose employees had swept some of it from the floor of the retailer's seed processing area (Pet. 3-4; Pet. App. 18). Mr. Huckleby apparently never had any occasion to use Panogen 15 nor any reason to inspect its label. Petitioners' claim, in essence, is that the government was negligent in allowing the manufacturer to use a label which did not enable the retailer to recognize treated grain before giving it to Mr. Huckleby (Pet. 10).

[2]A separate suit was filed in state court against the manufacturer and distributor of the toxic chemical. See *First National Bank in Albuquerque* v. *Nor-Am Argicultural Products, Inc.*, 88 N.M. 74, 537 P. 2d 682 (Ct. App.). That suit was dismissed with prejudice following settlement.

of appeals dismissed the suit on the ground that the acts or omissions alleged to be negligent fall within the discretionary function exception to suit under the Federal Tort Claims Act, 28 U.S.C. 2680(a).

1. The decision below is correct. As petitioners acknowledge (Pet. 9), the substantive issue is whether the label satisfied the statutory requirement that directions for use be "necessary and adequate if complied with" to prevent injury. 7 U.S.C. 135(z)(2)(c) and (d). As noted by both courts below (Pet. App. 12-13, 29), neither the statute nor the regulations specifies what is "necessary and adequate" to prevent injury. Thus, the Act and regulations call for policy judgments by the agency—in this case, the Pesticides Regulation Division of the Department of Agriculture—to determine what warning will be sufficient to meet the statute and regulations, not simply for a mechanistic determination of whether certain specified criteria have been met (*ibid.*). This case thus falls squarely within the statutory exception for discretionary functions as set forth in the Federal Tort Claims Act. See *Dalehite* v. *United States*, 346 U.S. 15.

In applying *Dalehite* to the facts of this case, the court of appeals correctly stated (Pet. App. 12-13; citations omitted):

> Thus, the statute [*i.e.*, FIFRA] and the regulations staked out only generalized policy standards for the precautions, warnings and directions for use. To enforce these standards, and give content and meaning to them, the agency was required to make policy judgments in evaluating the adequacy of the labeling. * * * We feel this is true as to all components of the labeling complained of by the plaintiffs—the warnings, precautions, and directions for use.

Contrary to petitioners' contention (Pet. 14-15), the principles of *Dalehite* were not overruled or weakened by this Court's subsequent decisions in *Indian Towing Co.* v. *United States*, 350 U.S. 61, *Rayonier, Inc.* v. *United States*, 352 U.S. 315, or *Hatahley* v. *United States*, 351 U.S. 173. In *Hatahley*, the Court simply held that the discretionary function exception is not applicable in a case of wrongful trespass. That ruling is not applicable here. In *Indian Towing*, the parties agreed that the discretionary function exception was not at issue; the government's contention was simply that it was not liable at all for negligent performance of "uniquely governmental functions" such as lighthouse service. 350 U.S. at 64. The Court rejected this argument but specifically held *Dalehite* inapplicable to the dispute. *Id.* at 69. Finally, *Rayonier* held that the United States could be liable for the negligence of Forest Service firefighters. But it is well established that the principle of *Dalehite* remains good law. See, *e.g.*, *Maynard* v. *United States*, 430 F. 2d 1264, 1266, n. 1 (C.A. 9); *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1010, n. 11 (Ct. Cl.); *Blaber* v. *United States*, 332 F. 2d 629, 631 (C.A. 2).

2. There is no conflict between the decision below and the decision of any other court of appeals. In *Griffin* v. *United States*, 500 F. 2d 1059 (C.A. 3), upon which petitioners rely (Pet. 18-20), the court held the discretionary function exception inapplicable where the government had approved for release a polio vaccine that did not meet the exact safety criteria set forth in regulations of the Department of Health, Education, and Welfare. The court reasoned that negligence in making a specific scientific evaluation of a particular lot of vaccine did not involve discretion at the planning level. But the court recognized that the "determination to approve a live-virus immunization program * * * [and promulgation of] the regulation which established the standard against which all manufactured lots were to be measured" (500 F. 2d

at 1064; footnote omitted) represented exercises of discretion. The latter governmental acts are more closely analogous to those at issue in this case: the government here had to balance the benefits of the chemical with its known hazards in order to determine whether to permit registration, and had to decide what warning would be "necessary and adequate" and not simply whether a given warning met exact criteria.[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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[3]Nor do the other cases cited by petitioners (Pet. 20-22) conflict with the decision below. Each case turned upon an analysis of specific facts; none questioned the vitality of *Dalehite* or the applicability of the discretionary function exception to facts such as those at issue here. To the contrary, that exception consistently has been recognized and applied in cases such as this. See, *e.g.*, *Martin* v. *United States*, 546 F. 2d 1355 (C.A. 9), certiorari denied, No. 76-1421, June 20, 1977; *Gercey* v. *United States*, 540 F. 2d 536 (C.A. 1), certiorari denied, No. 76-807, April 4, 1977.